Nos. 93-517, 527, 539

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,
Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

ON WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT

DAVID ZWIEBEL*
MORTON M. AVIGDOR
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, New York 10038
(212) 797-9000

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Nos. 93-517, 527, 539

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,
Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

ON WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT

INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish movement. As an advocate for Orthodox Jewish interests, and especially for the educational needs of Orthodox Jewish children, Agudath Israel has a great interest in both the outcome of this specific case and the Court's resolution of the broader thematic issues the case raises.

Many of the issues that affect Orthodox Jews in the United States arise along the boundary between church and state. This case is a good example. While its specific fact pattern is unique, some of its features are all too common: the refusal of local governmental entities adequately to accommodate the needs of minority religious communities; the frustration of a statutory mandate that all children, regardless of their religious background, receive education related services equitably; the diminution of religious freedom through an overly rigid application of the constitutional proscription against governmental establishment of religion.

The specific issue before the Court is the constitutionality of Chapter 748 of New York State's Laws of 1989, a remedy devised by the New York State legislature to resolve the impasse that had precluded the handicapped children of the Village of Kiryas Joel from receiving their statutory educational due. The Court's resolution of this issue is likely to have a profound impact not only on the handicapped Hasidic children whose educational future is directly at stake, not only on the broader community of Orthodox Jews whose strict observance of their faith frequently leads them to seek religious accommodations, but also on the numerous religious minority communities in this nation whose ways of life are jeopardized when governmental "neutrality" effectively translates into governmental hostility.

Agudath Israel's interest in this case extends also to the underlying cause for the impasse that led to the enactment of Chapter 748: this Court's rulings in

Aguilar v. *Felton*, 473 U.S. 402 (1985), and *School District of City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985), which have had a devastating impact on many children in the Orthodox Jewish community and other faith groups. This case illustrates how far-reaching are the *Felton / Grand Rapids* aftershocks, and affords the Court an opportunity to reflect once again on the wisdom of the holdings in those cases.

Accompanying this brief is a letter dated January 4, 1994, by which counsel for petitioner Board of Education of the Kiryas Joel Village School District consented to the filing of an *amicus* brief by Agudath Israel in support of petitioners. By letter dated December 17, 1993, which is on file with the Court, counsel for all other parties have so consented as well.

ARGUMENT

"Certainly," this Court observed in *Wolman* v. *Walter*, 433 U.S. 233, 247 n.14 (1977), "the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." The handicapped children of Kiryas Joel encountered precisely such logistical difficulties; and Chapter 748 represents precisely such a practical response. The courts below were wrong to conclude that the Establishment Clause forecloses the legislature's response.

Mindful of the admonition that "[a]n *amicus* brief which does not serve [the purpose of bringing relevant matter to the attention of the Court] simply burdens

the staff and facilities of the Court and its filing is not favored," Rule 37.1, *Rules of the Supreme Court of the United States* (1990), we confine our argument to two short thematic points. Beyond those points, we note for the record our support for the views and analysis of the dissenting judges in the courts below (*Grumet* v. *Board of Education of the Kiryas Joel Village School District*, 187 A.D. 2d 16, 25, 592 N.Y.S. 2d 123, 131 (3d Dept. 1992) (Levine, J., dissenting); *Grumet* v. *Board of Education of the Kiryas Joel Village School District*, 81 N.Y.2d 518, 545, 601 N.Y.S.2d 61,77 (1993) (Bellacosa, J., dissenting)); and our general concurrence with the many jurists and scholars who have called for a re-evaluation of "the aptly named *Lemon* test," Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654 (1992).

I.

TO UPHOLD THE DECISION BELOW, ESPECIALLY IN THE WAKE OF THE COURT'S RECENT FREE EXERCISE JURISPRUDENCE, WOULD LEAVE MINORITY RELIGIOUS PRACTITIONERS AND COMMUNITIES EXTREMELY VULNERABLE

Agudath Israel, like many other religious groups throughout the nation, shuddered to read the Court's words in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990):

> "Values that are protected against government interference through enshrinement in

> the Bill of Rights are not thereby banished from the political process....[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. *It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred* to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of religious beliefs." [Emphasis added.]

As chilling as *Smith's* message is to devotees of "religious practices that are not widely engaged in," the chill would become a deep freeze were the Establishment Clause given the type of expansive construction offered by the majorities below.

The background leading to the passage of Chapter 748, and indeed the substance of Chapter 748 itself, confirm the accuracy of *Smith's* observation about the "relative disadvantage" faced by minority religionists. Based on the traumatic experiences of the Hasidic children who did spend some time in its public school special education classes, the Monroe-Woodbury Central School District had full knowledge that its public schools were not the most appropriate environment in which to provide special education to the

handicapped children of Kiryas Joel. Yet the school district continued to insist that the children come to the public schools -- even after the New York Court of Appeals rejected its legal contention that it had no statutory authority to provide the special education services outside the regular public school classes, *Board of Education of the Monroe-Woodbury Central School District* v. *Wieder*, 72 N.Y.2d 174, 531 N.Y.S-.2d 889 (1988). In short, the school district asserted its majoritarian authority to refuse accommodation of the special education needs of a religious minority.

And so, put in a position where they could neither compel nor persuade the Monroe-Woodbury Central School District to accommodate their needs, the Villagers of Kiryas Joel did precisely what *Smith* would have encouraged Native Americans seeking accommodations of their peyote rituals to do: turn to the legislature for relief.

For all of the talk in the courts below about Chapter 748 as an "endorsement" of a particular denomination, the nature of the remedy fashioned by the legislature was surely less than ideal from the perspective of the Hasidim. It imposed on the Village the new duty of establishing its own school board; and it imposed on the school board (and the public school created by the school board) all the secular legal obligations of New York State law -- including obligations generally foreign to the Hasidic way of life. Further, it gave rise to the likely eventuality that the new Kiryas Joel Village School District would have to establish a regular non-handicapped public school for children whose non-Hasidic families would move into

the Village and demand regular public schooling. Neighborhoods can change, it should be recalled, even as laws remain the same.

No doubt the Hasidim would have been delighted had the legislature accommodated their special education needs through the type of "narrowly tailored legislation" suggested by Chief Judge Kaye in her concurring opinion below, 81 N.Y.2d at 539: "a law providing that the Monroe-Woodbury School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools." Apparently, however, that approach was deemed politically unfeasible -- presumably the Monroe-Woodbury Central School District, consistent with its obstinate insistence that it would service the handicapped children of Kiryas Joel only in its own public schools, would have opposed such legislation -- and the only solution that gained sufficient political support to break the impasse was to carve out a separate school district for Kiryas Joel. This was not a perfect solution, by any means, but the only solution that was politically doable, the only solution that addressed the urgent needs of some 200 handicapped children for special education services in a culturally compatible setting designed to maximize their educational progress.

Justice (now Chief Justice) Rehnquist, dissenting in *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), commented on the increasing "tension" between the two religion clauses of the First Amendment:

> "[P]erhaps [the] most important cause of the tension is our overly expansive interpretation of *both* Clauses. By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny." 450 U.S. at 721 (Rehnquist, J., dissenting; emphasis in original).

In the wake of *Smith*, the channel has been partially enlarged; constitutionally based free exercise claims to compulsory accommodation have all but been eviscerated, placing minority religious practitioners at the mercy of legislative and local governmental authorities. But as this case shows, even when such authorities are inclined to display mercy, the still broad view of the Establishment Clause hangs over any attempts at accommodation like a Sword of Damocles.

In *Hobbie* v. *Unemployment Appeals Commission of Florida*, 480 U.S. 136, 144-45 (1987), the Court spoke of its longstanding recognition "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *See also, e.g., Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). Despite the universal recognition of this general principle, courts have expressed varying degrees of deference toward legislative efforts to accommodate the needs of religious committees, with some all too eager to find that such efforts have an impermissible primary effect of "advancing religion" or creating a "symbolic union" between church and state.

See generally Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1 (1985).

Locating with precision the point at which permissible accommodation ends, and impermissible establishment begins, is concededly no simple task. We believe that Chief Justice Rehnquist had it right when he suggested in his *Thomas* dissent that "governmental assistance which does not have the effect of inducing religious belief, but instead merely accommodates or implements an independent religious choice does not impermissibly involve the government in religious choice and therefore does not violate the Establishment Clause of the First Amendment." *Thomas* v. *Review Board*, *supra*, 450 U.S. at 727 (Rehnquist, J., dissenting; internal quotations deleted).

Failure to permit legislative bodies ample and generous leeway under the Establishment Clause to accommodate the special needs of minority religious practitioners and communities, especially in this brave new post-*Smith* world of diminished constitutional protection for religious free exercise, would only hasten what Professor Stephen L. Carter has referred to as "[t]he potential transformation of the Establishment Clause from a guardian of religious liberty into a guarantor of public secularism." Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, at 122-23 (Basic Books 1993). We share Professor Carter's view that such transformation "raises prospects at once dismal and dreadful." *Id.* at 123.

II.

THIS CASE AFFORDS THE COURT OPPORTUNITY TO REFLECT UPON THE BITTER LEGACY OF ITS RULINGS IN *FELTON* AND *GRAND RAPIDS*

Although we believe that Chapter 748 is a constitutionally acceptable legislative resolution of the problem facing handicapped children in Kiryas Joel, we readily concede that it is an extraordinary resolution. And, as noted above, it is far from an ideal resolution.

That the legislature saw fit, and necessary, to fashion such an unusual remedy points to a striking aspect of this case, one the Court would do well explicitly to consider. Prior to 1985, the Monroe-Woodbury Central School District provided special education services to the handicapped children of Kiryas Joel by sending public school personnel to an annex of one of the religious schools in the Village. However, after this Court's companion rulings in *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985), and *Aguilar* v. *Felton*, 473 U.S. 402 (1985), prohibiting public school teachers from entering religious school premises to provide statutorily mandated remedial education services, the school district concluded that it could no longer continue this arrangement. Thus was launched the extraordinary odyssey that at long last has brought the parties to this Court today -- with stops along the way for bitter negotiations that led to nowhere, several rounds of acrimonious litigation in the state courts, and a visit to the state capitol in Albany for some extraordinary legislative relief.

When *Felton* was decided, Chief Justice Burger commented on the practical implications of the ruling:

> "Under the guise of protecting Americans from the evils of an Established Church such as those of the 18th century and earlier times, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. The program at issue covers remedial reading, reading skills, remedial mathematics, English as a second language, and assistance for children needing special help in the learning process. The 'remedial reading' portion of this program, for example, reaches children who suffer from dyslexia, a disease known to be difficult to diagnose and treat. Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.... I cannot join in striking down a program that, in the words of the Court of Appeals, 'has done so much good and little, if any, detectable harm'." 473 U.S. at 419-20 (Burger, C.J., dissenting).

Justice O'Connor, in a similar vein, offered the following observation:

> "For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom

> are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in *Meek* v. *Pittenger* on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause." *Id.*, 473 U.S. at 431 (O'Connor, J., dissenting).

Eight-and-a-half years later, it has become apparent that *Felton* and *Grand Rapids* have had negative impacts that extend considerably further even than the dissenting Justices at that time envisioned -- not just in the context of statutorily mandated remedial education services to religious school students, but also in the context of cases like this one involving special education services for the handicapped.

In 1987, Agudath Israel called on Congress to take steps to help alleviate the post-*Felton* problems, which had become apparent already then. We summarized those problems under four broad headings:

> "These, then, are the problems created by *Felton*: (1) decreased participation by nonpublic schools students in the Chapter 1 pro-

> gram; (2) academically and socially unsatisfactory off-premises alternate service delivery mechanisms for students who do participate; (3) staggering administrative expenses necessary to implement such off-premises services; and (4) heightened inter-community strife and tension." (Testimony of David Zwiebel on behalf of Agudath Israel of America, before the House Subcommittee on Elementary, Secondary and Vocational Education, March 30, 1987.)

Each of these four points, no less valid today than when Agudath Israel presented its congressional testimony, merits brief elaboration.

(1) *Decreased Participation*: In an August 1993 study, *Chapter 1 Services to Private Religious School Students: A Supplemental Volume to the National Assessment of the Chapter 1 Program* (hereafter referred to as the "Department of Education Study"), the U.S. Department of Education indicated that there was a considerable decline in the number of nonpublic school students participating in the Chapter 1 program in the years since *Felton* was decided -- dropping from approximately 185,000 in 1984-85, the year prior to the decision in *Felton*, to approximately 128,000 in 1985-86, and then gradually increasing to approximately 158,000 in 1990-91 (the last year for which figures were available). Department of Education Study at 9. The study shows that despite a broad array of alternative service delivery mechanisms developed in the aftermath of *Felton* -- *e.g.*, mobile

vans parked near religious schools; other neutral sites; public school facilities; computer assisted instruction on religious school grounds -- the level of religious school student participation still has not reached pre-*Felton* numbers. *Id.* at 8.

(2) *Diminished Quality*: The Department of Education Study focused also on the quality of Chapter 1 services for nonpublic school children in the post-*Felton* era:

> "Although the religious-school educators interviewed in the case studies said that their students benefitted from Chapter 1, they also said that services were better before *Felton*. They expressed concern about the physical and programmatic isolation of Chapter 1 from other school programs... As other studies have documented, the mobile units can be noisy, difficult to park and very cramped. At the risk of over-simplification, case study data suggest that good teachers were usually able to adapt to the limits imposed by the mobile units, but they seldom overcome them. Other teachers had difficulty adapting to the mobile units and ended up relying on a very limited repertoire of instructional activities. CAI [Computer Assisted Instruction] as a single service delivery option typically does not focus on advance thinking skills or expose students to challenging content, and students often have little or no direct contact with Chapter 1 instructional personnel. CAI in combination with other strategies appeared to

be an improvement, but there were difficulties in coordination and communication, which almost certainly detracted from the overall quality of the instructional program". *Id.* at 53-54.

Agudath Israel's own experience in dealing with Jewish nonpublic schools confirms these findings. Particularly with respect to off-premises services, the principals of these schools have complained that they face severe administrative and logistical problems. Those problems pale in comparison to the problems faced by students who have to put on their coats and boots in the middle of the school day to traipse along to some off-premises site for remedial education, who suffer displacement, disruption and discomfort, as well as a social stigma that negates much of the benefit of the Chapter 1 remedial program. And while computer assisted Chapter 1 instruction has gained some popularity in the schools we deal with, the overwhelming consensus of the principals is that there is no substitute, especially in remedial education, for face-to-face instruction and interaction.

(3) *Economic Costs*: Congress has appropriated many tens of millions of dollars to cover the costs needed to develop alternative service delivery mechanisms in the aftermath of the *Felton* ruling. Appropriations for capital expenses for fiscal years 1988-91 approached $81 million. [Department of Education Study, at 43.] However, according to a 1989 GAO study, districts throughout the country incurred some $105 million in eligible expenses through 1988-89, *id.* -- thereby requiring state and local governments to

make up the additional costs either through special local allocations, or directly out of Chapter 1 educational funds.

Several courts have ruled that special expenses incurred by school districts in implementing the necessary alternative service delivery mechanisms must be borne by the Chapter 1 program as a whole, not just by that portion of the program allocated to nonpublic schools. *Board of Education of City of Chicago* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991). Thus, *Felton*'s impact has been felt not only in the nonpublic school sector, but even in the public schools, from which vitally important Chapter 1 dollars have been siphoned off to cover alternative service delivery mechanisms for nonpublic school children.

(4) *Inter-community strife*: This case, and several others that have arisen in the post-*Felton* era (*see, e.g., Parents' Association of P.S. 16* v. *Quinones*, 803 F.2d 1235 (2d Cir. 1986)), point to one of the most tragic ironies of the *Felton* decision: It has engendered precisely the types of "political divisiveness along religious lines" that Justice Brennan's majority opinion, 473 U.S. at 414, claimed it was designed to avoid. *See also* Justice Powell's concurring opinion in *Felton*, 473 U.S. at 416. So long as *Felton* remains the law of the land -- and local education officials struggle to balance the competing requirements of providing religious school children with equitable Chapter 1 services while avoiding anything that might cross the line into forbidden establishment of religion, all the

while trying to achieve both goals within reasonable budgetary constraints -- conflict is likely to arise again and again.

The constitutionality of public school teachers entering religious school premises for the purposes of delivering remedial or special education services is not now directly before this Court. However, as should be readily apparent by the background that led up to this litigation, the ideal solution to the problem faced by the 200 handicapped children of Kiryas Joel -- and the problem faced by thousands of nonpublic school students who have been deprived, qualitatively and quantitatively, of statutorily mandated special education or remedial education services; and the problem faced by the many hundreds of thousands of public school students whose funds for such services are being eaten away by the "off-the-top" costs of providing the alternative service delivery mechanisms required by *Felton*; and the problem faced by all taxpayers who have been forced to bear the extra burden of enormous special legislative expenditures to help meet those additional costs -- the ideal solution would be for the Court to reconsider its justly maligned 5-4 rulings in *Felton and Grand Rapids*. And while the Court cannot directly do so in this case, it can offer signals.

SUMMARY OF ARGUMENT AND CONCLUSION

The importance of this case transcends the narrow and unusual context in which it arises. Its resolution may well determine whether religious practitioners and communities can turn with confidence to legislative bodies for accommodation of their special needs.

Asymmetrical applications of the First Amendment's two religion clauses would pose a great threat to the interests of minority religious communities like the Hasidic Jews of Kiryas Joel. If the Free Exercise Clause is to be given so narrow a construction that minority religionists will typically not be able to look to the Constitution as a shield for protection of their religious freedoms, then the Establishment Clause ought not be given so broad a construction that opponents of religious freedom will be able to use the Constitution as a sword against legislative efforts at accommodation.

This case further demonstrates what lies at the bottom of the slippery slope created by this Court's ill-conceived rulings in *Felton* and *Grand Rapids*. In addressing the constitutionality of Chapter 748, the Court would also do well to take note of the flawed jurisprudence that precipitated the Kiryas Joel crisis in the first place.

For the reasons set forth in the dissenting opinions below, and in view of the considerations set forth

herein, Agudath Israel of America respectfully urges that the decision below be reversed.

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
MORTON M. AVIGDOR
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, New York 10038
(212) 797-9000

* Counsel of Record

January 21, 1994